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Regulations Counsel
Office of the General Counsel
Department of Housing & Urban Development
451 Seventh Street, SW, Room 10276
Washington, DC 20410-0001

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RE: Docket No. FR-6123-P-02, RIN 2577-AA97
Notice of Proposed Rulemaking, HUD's Affirmatively Further Fair Housing Proposed Rule

Dear Secretary Carson and General Counsel Compton:

The National Fair Housing Alliance ("NFHA"), on behalf of itself and its 200 members, offers the following comments in strong opposition to the Department of Housing and Urban Development's (HUD) proposed rule titled Affirmatively Furthering Fair Housing ("Proposed Rule").¹

The National Fair Housing Alliance is the nation's only national non-profit, civil rights organization dedicated to eliminating all forms of housing discrimination. Founded in 1988, we have worked for over 30 years to advance fairness and equal opportunities in our nation's housing, lending and insurance markets. The National Fair Housing Alliance has used the federal Fair Housing Act, including our work on implementation of the affirmatively furthering fair housing mandate, to provide fair housing opportunities for millions of people, including:

- Assisting over 750,000 victims of discrimination;
- Working with thousands of housing providers to halt discriminatory practices;
- Working with lenders and other financial services partners to expand fair lending opportunities for millions of consumers;
- Creating 20,000 accessible housing units;
- Rehabbing 700 abandoned and blighted homes;
- Assisting 800 homeowners avoid foreclosure;
- Facilitating the improved maintenance of 750,000 foreclosed properties;
- Facilitating 10,000 financial literacy workshops for more than 200,000 consumers; and

¹ HUD's Implementation of the Fair Housing Act's Affirmatively Furthering Fair Housing mandate, 83 Fed. Reg. 683 (Jan. 5, 2020) ("Proposed Rule").

- Facilitating the investment of over \$140,000,000 in under-served communities throughout the United States.

Housing discrimination and segregation remain intractable problems in large part because the entities that helped create and perpetuate discrimination have not stepped up to be a meaningful part of the solution. The 2015 AFFH Rule provided the first real roadmap for participants to understand both what it means to affirmatively further fair housing and their role in achieving that goal. Weakening the rule would result in millions of families and individuals suffering from unnecessary discrimination. It would stifle opportunity and undermine our prosperity. Rather than pursuing this course, we strongly urge HUD to preserve the existing AFFH regulation and use its resources to ensure effective implementation, oversight, and enforcement of that regulation.

Purpose and Intent of the Fair Housing Act

Title VIII of the Civil Rights Act of 1968, better known as the Fair Housing Act, was enacted just seven days after the assassination of Dr. Martin Luther King, Jr. Enshrined in the Fair Housing Act was the principle that every individual has the right to choose where they want to live, free from discrimination, and in a neighborhood in which they can thrive. Central to carrying out this principle is the prohibition of acts of discrimination in the rental, sales, insurance, lending, and housing-related products and services based on race, color, national origin, religion, sex, disability and familial status AND the affirmative responsibility of every level of government to correct the harms of government- and privately-sponsored residential segregation. This latter component is known as the “Affirmatively Furthering Fair Housing” mandate of the Fair Housing Act and it requires recipients of federal housing and community development dollars to work toward eliminating discriminatory practices and dismantling residential segregation.

At the heart of the Fair Housing Act’s AFFH provision is a recognition that only intentional integrative policy can undo the history of intentional segregation, and the Fair Housing Act was constructed to confront the role of government-engineered policies and practices that have cemented segregation throughout the United States. These policies included the disbursement of land grants, or “Headrights” as they were known during the Colonial Era, to new settlers willing to establish farms or homes when farm lands were given to them.² Following the American Revolutionary War, land grants were given to veterans as compensation for their service. In the run-up to the American Civil War, President Abraham Lincoln spearheaded the Homestead Act to encourage westward migration and development in newly established states and territories. While Headrights, Land Grants, and Homestead Grants allowed millions of Americans to achieve land ownership and homeownership, these programs nearly exclusively benefitted Whites.³ By the end of the Reconstruction Era in 1877, Jim Crow laws began to take root and with them came greater opportunities for Whites that were similarly unavailable to people of color.

² See http://www.pbs.org/race/000_About/002_04-background-03-02.htm.

³ See “The Case for Fair Housing: 2017 Fair Housing Trends Report,” National Fair Housing Alliance, page 15. Available at <https://nationalfairhousing.org/wp-content/uploads/2017/07/TRENDS-REPORT-2017-FINAL.pdf>.

During the 1920s, it became increasingly common for White elected officials, developers, lenders, real estate agents and resident associations to establish discriminatory housing and zoning policies designed to maintain the White composition of residential neighborhoods. Associations often referred to as “neighborhood improvement associations” actively sought to influence local government bodies to establish racial zoning restrictions. These associations would threaten to boycott individual real-estate agents who were willing to work with African-American homeowners. White residents in communities throughout the nation established contracts amongst themselves known as “restrictive covenants” that legally prohibited White residents from selling or renting their property to prospective residents of color.⁴

From the post-Depression era through the aftermath of World War II, federal policies that stabilized the floundering housing market and opened housing opportunities for returning veterans and their families expressly excluded people of color from the benefits of government-supported housing programs. Among these programs were public housing, which created much-needed housing for working families; the Home Owners Loan Corporation (“HOLC”), which bought up and refinanced millions of defaulted mortgages following the Great Depression; and the Federal Housing Administration (“FHA”), which financed the development of America’s suburbs and opened the door to homeownership for millions of working class families through its mortgage insurance programs.

The United States Housing Act of 1937 established the United States Housing Authority and tasked it with providing assistance to local public housing authorities (“PHAs”) to develop, acquire, and manage public housing projects. Built into the law was a requirement that for every unit of public housing built another unit of slum housing was to be demolished. Assistance to public housing authorities was premised on the requirement that public housing could not alter the racial characteristics of the neighborhood in which it was located. Not until the Housing Act of 1949 was the issue of residential segregation brought up again. Then a “poison pill” amendment that would have required integration in public housing was added to the bill with the express purpose of making the passage of the bill dependent on the support of Southern Democrats who otherwise supported public housing so long as it remained segregated. As Richard Rothstein has described:

“Liberals had to choose either segregated public housing or none at all. Illinois Senator Paul Douglas argued, ‘I am ready to appeal to history and to time that it is in the best interests of the Negro race that we carry through the [segregated] housing program as planned, rather than put in the bill an amendment which will inevitably defeat it.’”⁵

Thus, it was federally mandated that public housing investments after World War II preserve existing patterns of residential segregation while creating new patterns of segregation where they did not previously exist.

⁴ In 1948, the Supreme Court held for the first time that enforcement by state courts of racially restrictive covenants violated the Equal Protection Clause of the Fourteenth Amendment. *See Shelley v. Kraemer*, 334 U.S. 1, 23 (1948).

⁵ *See* Rothstein, Richard, “The Making of Ferguson,” *The American Prospect*, Fall, 2014, available at <http://prospect.org/article/making-ferguson-howdecades-hostile-policy-created-powder-keg>.

Initiatives under the New Deal were directly aimed at tackling instability in many economic markets, especially housing. The Home Owners Loan Corporation was created in 1933 with the purpose of stabilizing the housing market and protecting homeownership. The HOLC established the low down payment, long-term, fixed-rate, fully-amortizing mortgage, stabilizing the mortgage market by eliminating its volatility and making mortgages less risky for borrowers. But in the process of attempting to eliminate risk in the market, the HOLC adopted property appraisal processes that mimicked the view in the private market that the presence of African-Americans, certain immigrants and some religious groups directly contributed to neighborhood deterioration and decline in property values.⁶ The HOLC created a neighborhood classification system that rated communities based on a “desirability scale” and was accompanied by Residential Security Maps. On these maps entire neighborhoods could be coded as “hazardous” simply because of the presence of African-American or other “inharmonious” racial or social groups. This neighborhood classification system was used to constrict mortgage lending in neighborhoods with any level of measurable integration. This institutionalized the practice of redlining, or widespread disinvestment from neighborhoods of color and the denial of mortgage credit to their residents.

In 1934 the FHA was also established with the task of stabilizing the mortgage market and it similarly did so through discriminatory means. FHA built upon the mortgage model developed by the HOLC to insure loans for the construction and the sale of new homes. By lowering the required down payment from 30 percent to 10 percent and offering lower interest rates, FHA allowed more working families to afford homeownership and build wealth. However, only White Americans were able to access FHA-insured loans, and the FHA Underwriting Manual furthered the redlining of communities of color. In fact, the FHA Underwriting Manual went further than the HOLC classification system by advocating for the use of deed restrictions. Section 228 of the manual read: “Deed restrictions are apt to prove more effective than a zoning ordinance in providing protection from adverse influences.”⁷ In Section 284, the manual goes on to suggest that deed restrictions should include a “[p]rohibition of the occupancy of properties except by the race for which they are intended.”⁸ FHA also placed limitations on construction loans which required that builders agree not to sell any of those homes to African-American homebuyers, and it provided oft-used model restrictive covenants for builders.⁹ Thus, through generations of discriminatory housing and lending policies the American government institutionalized residential segregation and created the foundations upon which modern racial and economic isolation continue.

⁶ The most extensive set of HOLC maps available, many accompanied by the descriptions that explain the classification assigned to each neighborhood, can be found on the website “Mapping Inequality,” at <https://dsl.richmond.edu/panorama/redlining/#loc=4/36.71/-96.93&opacity=0.8>.

⁷ 1938 FHA Underwriting Manual, available at <http://www.urbanoasis.org/projects/fha/FHAUnderwritingManualPtII.html#301>.

⁸ Federal Housing Administration Underwriting Manual, 1938, cited in Abrams, Charles, “The Segregation Threat in Housing,” in Straus, Nathan, “Two-Thirds of a Nation: A Housing Program,” Alfred A. Knopf, New York, 1952.

⁹ Abrams, op. cit. p. 220.

Indeed, the legislative history of the Fair Housing Act reflects the need to address institutionalized residential segregation and calls out the realities of children living in redlined, disinvested neighborhoods at the time. In the discussion surrounding the protections of the 14th Amendment, the Fair Housing Act's legislative history shows:

“That the benefits of government [were] less available in ghettos can be amply documented. The ghetto child is more likely to go to an inferior school. His parents are more likely to lack adequate public transportation to commute to and from places of work, and so will miss employment opportunities.”¹⁰

It is clear from this legislative history that the Fair Housing Act's AFFH provision was intended to address the lack of neighborhood opportunity resultant from government-sponsored segregation. The patterns of residential segregation established before the Fair Housing Act were passed remain today. Their impacts on the well-being of the nation's children are well-documented and there is a strong relationship between where children live and the hazards and opportunities to which they are exposed.

The Proposed Rule will not serve to carry out the purpose and intent of the Fair Housing Act. The procedures outlined in the Proposed Rule – in contrast to the existing 2015 rule – do not require program participants to meaningfully consider the history of discrimination and segregation that has shaped regions across the country. The Proposed Rule proffers a definition of AFFH that is focused on advancing fair housing choice within the program participant's control without any reference to concepts central to the definition of AFFH in the existing 2015 rule, including taking “meaningful actions” that “address significant disparities in housing needs and in access to opportunity, replacing segregated living patterns with truly integrated and balanced living patterns, transforming racially and ethnically concentrated areas of poverty into areas of opportunity, and fostering and maintaining compliance with civil rights and fair housing laws.”¹¹ There is nothing in the Proposed Rule that requires program participants to address institutionalized residential segregation, and as such it fails to meet the AFFH mandate imbedded in the intent of the Act.

HUD's Mission Includes Eliminating Housing Discrimination and Dismantling Segregation

In tasking HUD with implementation of the Fair Housing Act, Congress deliberately authorized the agency to actively leverage the federal resources it administers toward the goal of remediating past discriminatory government policies and practices. Not only is HUD's mission to ensure that housing discrimination does not persist and is addressed, but HUD is also responsible for overseeing its own housing and community development programs to ensure that they do not further perpetuate residential segregation. As the administrator of resources for the PHAs throughout the nation, HUD also has the responsibility to reverse the decades of racial and economic isolation that it previously required PHAs to undertake. Similarly, HUD is responsible for ensuring the FHA underwriting guidelines do the utmost to provide access to affordable and

¹⁰ February 6, 1968, United States of America Congressional Record: Proceedings and Debates of the 90th Congress, Second Session, Volume 114-Part 2, page 2273.

¹¹ Affirmatively Furthering Fair Housing, 80 Fed. Reg. 42,272 (2015).

quality credit to all borrowers, regardless of their identification with a federally protected class. Ultimately, HUD’s overarching mission is to ensure that communities throughout the nation have the resources and support they need to provide stable, safe, and affordable housing choices for their residents regardless of federally protected class. This mission cannot be achieved without fully addressing the persistent residential segregation and economic isolation that HUD and other federal agencies created. The 2015 AFFH rule was a significant step in the right direction.

The Proposed Rule is fundamentally counter to HUD’s mission. HUD’s mission states that HUD will work “to create strong, sustainable, inclusive communities” and “build inclusive and sustainable communities free from discrimination,”¹² but the Proposed Rule fails to require that program participants assess residential segregation in any meaningful manner. By eliminating the fair housing planning requirements and utterly diluting the program participant requirements, the Proposed Rule will not meaningfully create inclusive communities.

The Impact of Segregation on Opportunity Outcomes for the American Public

Where a person lives determines the types of opportunities they will have – where their children attend school, their transportation options, whether they have safe places to play and access to grocery stores that sell healthy foods, even whether they have clean air to breathe and how long they are likely to live. However, due to the legacy of government-sponsored segregation there are disparities across the board for members of protected classes under the Fair Housing Act. The disparities faced by children, particularly children of color, described in detail below, illustrate clearly the types of disparities faced all too frequently by members of all protected classes, regardless of their age. It is well documented that the disparate outcomes that children experience are tied to segregation and concentrated poverty. Residential segregation is a direct determinant of the opportunities children have access to and their outcomes in terms of educational attainment, health and well-being, financial well-being, and involvement in the criminal justice system.

Concentrated Poverty, Economic Outcomes and Housing Cost Burden Affecting Children

The legacy of residential segregation has cemented patterns of concentrated poverty¹³ across urban centers and continues to produce negative outcomes for children living in those conditions. However, children of color experience significant disparities in outcomes when compared to the life outcomes of White children. Black and American-Indian children are seven times more likely to live in high-poverty neighborhoods than White children, and Latino children are nearly five times more likely to live in high-poverty neighborhoods.¹⁴ Those disparities exist along poverty rates and housing affordability; health indicators and outcomes and exposure to hazardous environmental conditions; rates of educational attainment; public safety indicators and exposure to the criminal justice system. When considered together, these disparities paint a

¹² HUD’s Mission Statement, available at <https://www.hud.gov/about/mission>.

¹³ Census tracts with overall poverty rates of 30 percent or more.

¹⁴ The Annie E. Casey Foundation, Data Snapshot – Children Living in High-Poverty, Low-Opportunity Neighborhoods, pages 1-2, September 24, 2019. Accessed on February 3, 2020 and available at <https://www.aecf.org/resources/children-living-in-high-poverty-low-opportunity-neighborhoods/>.

picture of what it is like for children of color to grow up in United States and how place may perpetuate those disparities.

Recent research has shown that urban areas, especially those with substantial concentrated poverty, typically correlate with worse outcomes for children compared to suburbs and rural areas, regardless of family income. Researchers Raj Chetty and Nathaniel Hendren studied more than five million families who moved across counties and commuting zones and accounted for the age of children when they moved to determine their economic outcomes. Chetty and Hendren found that children whose parents move to a neighborhood with higher income earning potential earned more income as young adults. This research suggests that the counties in which children grow up in accounts for an estimated 1/5 of the gap in earnings between Black and White populations.¹⁵

Children of color experience greater levels of poverty and extreme poverty, and their families suffer from higher housing cost burdens than their White counterparts. In 2018, 32 percent of Black children, 31 percent of American-Indian children, and 26 percent of Hispanic or Latino children lived in poverty compared to just 11 percent of non-Hispanic White children.¹⁶ Breaking down that data further, it is clear that children of color also are more likely to live in extreme poverty than their White counterparts. In 2018, 16 percent of Black children, 15 percent of American-Indian children, and 10 percent of Hispanic or Latino children lived in extreme poverty, compared to five percent of White children.¹⁷ In 2018, 44 percent of Black children, 41 percent of Hispanic or Latino children, and 29 percent of American-Indian children lived in high housing-cost burdened households, compared to 22 percent of non-Hispanic White children.¹⁸ To remove a racial analysis blatantly ignores the stark disparities in child outcomes in America.

¹⁵ Chetty, Raj and Hendren, Nathaniel, “The Impacts of Neighborhoods on Intergenerational Mobility: Childhood Exposure Effects and County-Level Estimates,” pages 1, 7, May, 2015.

¹⁶ KIDS COUNT Data Center, The Annie E. Casey Foundation, “Children in poverty by race and ethnicity in the United States.” Accessed February 3, 2020 and available at <https://datacenter.kidscount.org/data/tables/44-children-in-poverty-by-race-and-ethnicity?loc=1&loct=1#detailed/1/any/false/37,871,870,573,869,36,868,867,133,38/10,11,9,12,1,185,13/324,323>.

¹⁷ KIDS COUNT Data Center, The Annie E. Casey Foundation, “Children in extreme poverty (50 percent poverty) by race and ethnicity in the United States.” Extreme poverty is defined as the share of people who live in families with incomes less than 50 percent of the federal poverty level. Accessed February 3, 2020 and available at <https://datacenter.kidscount.org/data/tables/8783-children-in-extreme-poverty-50-percent-poverty-by-race-and-ethnicity?loc=1&loct=1#detailed/1/any/false/37,871,870,573,869,36,133,35,16/4038,4040,4039,2638,2597,4758,1353/17619,17620>.

¹⁸ KIDS COUNT Data Center, The Annie E. Casey Foundation, “Children living in households with a high housing cost burden by race and ethnicity in the United States.” Households with a high housing cost burden are those where more than 30 percent of monthly household pretax income is spent on housing-related expenses such as rent, mortgage payments, taxes and insurance. Accessed February 3, 2020 and available at <https://datacenter.kidscount.org/data/tables/7678-children-living-in-households-with-a-high-housing-cost-burden-by-race?loc=1&loct=1#detailed/1/any/false/37,871,870,573,869,36,868,867,133,38/10,11,9,12,1,185,13/14832,14833>.

Child Health Outcomes

Children of color and their families experience lower rates of health care and well-being than their White counterparts. In 2017, 12 percent of American-Indian births, ten percent of Black births, and eight percent of Hispanic or Latino births were by women receiving late or no prenatal care, compared to four percent of White births.¹⁹ And surveys between 2016 and 2017 revealed that 16 percent of Black children, 14 percent of American Indian children, 15 percent of Hispanic or Latino Children, and 11 percent of Asian or Pacific Islander children were not in excellent or very good health, compared to just seven percent of White children.²⁰

Educational Outcomes for Children and Teens

Children and teens of color have significantly worse educational outcomes than their White counterparts. Data for 2019 show that 82 percent of Black children, 80 percent of American-Indian children, and 77 percent of Hispanic or Latino children in fourth grade scored below proficient reading levels, compared to 56 percent of White Children.²¹ In the same year 87 percent of Black children, 85 percent of American-Indian children, and 81 percent of Hispanic or Latino children in the eighth grade scored below proficient math achievement level, compared to 57 percent of White children.²² And in 2018, seven percent of American-Indian teens, five percent of Hispanic or Latino teens, and four percent of Black teens between the ages of 16 and 19 were not in school and were not high school graduates, compared to three percent of White teens.²³

¹⁹ KIDS COUNT Data Center, The Annie E. Casey Foundation, “Births to women receiving late or no prenatal care by race and ethnicity in the United States.” Accessed February 3, 2020 and available at <https://datacenter.kidscount.org/data/tables/10005-births-to-women-receiving-late-or-no-prenatal-care-by-race-and-ethnicity?loc=1&loct=1#detailed/1/any/false/871,870/10,11,9,12,1,185,13/19383,19384>.

²⁰ KIDS COUNT Data Center, The Annie E. Casey Foundation, “Children who are not in excellent or very good health by race and ethnicity in the United States.” Accessed February 3, 2020 and available at <https://datacenter.kidscount.org/data/tables/9728-children-who-are-not-in-excellent-or-very-good-health-by-race-and-ethnicity?loc=1&loct=1#detailed/1/any/false/1603/10,168,9,12,1,13/18986,18987>.

²¹ KIDS COUNT Data Center, The Annie E. Casey Foundation, “Fourth graders who scored below proficient reading level by race in the United States.” Accessed February 3, 2020 and available at <https://datacenter.kidscount.org/data/tables/5126-fourth-graders-who-scored-below-proficient-reading-level-by-race?loc=1&loct=2#detailed/1/any/false/1729,871,573,36,867,38,18,16/10,168,9,12,185,107/11557>

²² KIDS COUNT Data Center, The Annie E. Casey Foundation, “Eighth graders who scored below proficient math achievement level by race in the United States.” Accessed February 3, 2020 and available at <https://datacenter.kidscount.org/data/tables/7665-eighth-graders-who-scored-below-proficient-math-achievement-level-by-race?loc=1&loct=1#detailed/1/any/false/1729,871,573,36,867,38,18,16/107,9,12,168,10,185/14819>.

²³ KIDS COUNT Data Center, The Annie E. Casey Foundation, “Teens ages 16 to 19 who are not in school and are not high school graduates by race in the United States.” Accessed February 3, 2020 and available at <https://datacenter.kidscount.org/data/tables/74-teens-ages-16-to-19-who-are-not-in-school-and-are-not-high-school-graduates-by-race?loc=1&loct=1#detailed/1/any/false/37,871,870,573,869,36,868,867,133,38/10,11,9,12,1,185,13/383,382>.

Safety Indicators and Exposure to the Criminal Justice System

Children of color feel significantly less safe in their neighborhoods and they and their parents are more likely to have been involved in or exposed to the criminal justice system compared to their White counterparts. Between 2016 and 2017, nine percent of Black children, eight percent of Hispanic or Latino children, and 7 percent of American-Indian children lived in a neighborhood identified as “sometimes” or “never” safe, compared to three percent of White children.²⁴ And between 2016 and 2017, 37 percent of American-Indian children, 33 percent of Black children, and 20 percent of Hispanic or Latino children reported having experienced two or more adverse life experiences, compared to 18 percent for White children.²⁵

In 2017, for every 100,000 children, 383 Black children, 235 American-Indian children, and 118 Hispanic children lived in a juvenile detention, correctional, and/or residential facility, compared to 83 White children.²⁶ And in 2016 to 2017, 19 percent of American-Indian children, 15 percent of Black children, and seven percent of Hispanic or Latino children had a parent who was ever in jail or prison after they were born, compared to six percent of non-Hispanic White children.²⁷

Researchers at DiversityDataKids.Org and Brandeis University have produced a groundbreaking measure that quantifies and compares neighborhood opportunity in every neighborhood or census tract in the United States, known as the Child Opportunity Index 2.0. This metric measures neighborhood opportunity for children along three combined areas: education; health and environment; and social and economic conditions that affect children.²⁸ Among the

²⁴ KIDS COUNT Data Center, The Annie E. Casey Foundation, “Children who live in unsafe communities by race and ethnicity in the United States.” Accessed February 3, 2020 and available at <https://datacenter.kidscount.org/data/tables/9730-children-who-live-in-unsafe-communities-by-race-and-ethnicity?loc=1&loct=1#detailed/1/any/false/1603/10,11,9,12,1,13/18988,18989>.

²⁵ KIDS COUNT Data Center, The Annie E. Casey Foundation, “Children who have experienced two or more adverse experiences by race and ethnicity in the United States.” Adverse experiences include: frequent socioeconomic hardship, parental divorce or separation, parental death, parental incarceration, family violence, neighborhood violence, living with someone who was mentally ill or suicidal, living with someone who had a substance abuse problem or racial bias. Accessed February 3, 2020 and available at <https://datacenter.kidscount.org/data/tables/9729-children-who-have-experienced-two-or-more-adverse-experiences-by-race-and-ethnicity?loc=1&loct=1#detailed/1/any/false/1603/10,11,9,12,1,13/18990,18991>.

²⁶ KIDS COUNT Data Center, The Annie E. Casey Foundation, “Youth residing in juvenile detention, correctional and/or residential facilities by race and Hispanic origin in the United States.” Accessed February 3, 2020 and available at <https://datacenter.kidscount.org/data/tables/8391-youth-residing-in-juvenile-detention-correctional-and-or-residential-facilities-by-race-and-hispanic-origin?loc=1&loct=1#detailed/1/any/false/871,573,36,867,133,18,17,14,12,10/4038,4411,1461,1462,1460,4157,1353/16996,17598>.

²⁷ KIDS COUNT Data Center, The Annie E. Casey Foundation, “Children who had a parent who was ever incarcerated by race and ethnicity in the United States.” Accessed February 3, 2020 and available at <https://datacenter.kidscount.org/data/tables/9734-children-who-had-a-parent-who-was-ever-incarcerated-by-race-and-ethnicity?loc=1&loct=1#detailed/1/any/false/1603/10,11,9,12,1,13/18995,18996>.

²⁸ Acevedo-Garcia, D., Noelke, C., and McArdle, Nancy, “The Geography of Child Opportunity: Why Neighborhoods Matter for Equity – First findings from the Child Opportunity Index 2.0,” January, 2020.

neighborhood conditions factored into the index are: high school graduation rates; poverty and employment rates; housing vacancy rates and homeownership levels; air pollution levels; and the availability of green spaces and healthy food options. Researchers scored every neighborhood or census tracts in the United States along the following levels: very-low, low, moderate, high, or very-high opportunity.²⁹ The most recent findings from the Child Opportunity Index speak volumes to the harm that neighborhood conditions can expose children to and explain the disparities documented above.

Researchers found that there is a wide variation in child opportunity across metros but an even greater divide within metro areas themselves. The most recent findings observed that children who live short distances from each other often experience entirely different neighborhood opportunity – only 9 percent of the disparity in neighborhood opportunity for children occurs between metros, while 91percent occurs within the same metro.³⁰ Within the 100 largest metropolitan areas, 32 percent of families living in very-low opportunity neighborhoods live below the federal poverty line, compared to only 4 percent of families in very-high opportunity neighborhoods. Only 42 percent of young children in very-low opportunity neighborhoods are enrolled in preschool compared to 64 percent of young children in very-high opportunity neighborhoods. Recent findings also show that very-low opportunity neighborhoods are less likely to have green space and more likely to experience extreme heat, exposing children to worse health outcomes.³¹

The Child Opportunity Score for White children is three times that of the score for Black children, and two times that of the score for Latino children.³² Similarly, Black children are 7.6 times more likely and Latino children are 5.3 times more likely to live very-low opportunity neighborhoods than White children.³³

Data on the various opportunity outcomes described above generally show that children of Asian and Pacific Island descent fare near or better than their White counterparts. However, it is important to note that these data in the aggregate do not reflect the known disparate opportunity outcomes experienced by children of various national origins of Asian or Pacific Island descent. More work must be done to better capture the disparities that children of Asian or Pacific Island descent experience.³⁴

Additionally, while this research is illuminating, it is important to assert that the terminology it uses does not reflect the value or importance of any low-index neighborhoods or the children that live in them. Instead, the score a neighborhood receives reflects the level of disinvestment and neglect associated with the impacts of residential segregation throughout American history.

²⁹ Ibid, p. 2.

³⁰ Ibid, p. 17.

³¹ Ibid, p. 31.

³² Ibid, p. 35.

³³ Ibid, p. 38.

³⁴ For more information on the breakdown of Asian American and Pacific Islander poverty, see National CAPACD, “Spotlight: Asian American & Pacific Islander Poverty,” June 2013. Available at <https://www.nationalcapacd.org/data-research/spotlight-asian-american-pacific-islander-poverty/>.

These are the results of failed AFFH enforcement and children growing up in “very-low or low opportunity” neighborhoods, particularly children of color, bear the brunt of this legacy.

The Proposed Rule will limit access to opportunity for the American public and notably for our nation’s children. The Proposed Rule does not require local jurisdictions to evaluate the extent to which residents’ lives are meaningfully impacted by discrimination and segregation when setting their fair housing priorities – as the existing 2015 rule does – and so it will result in greater incidents of concentrated poverty and poorer health, education, and safety outcomes, especially for children.

AFFH Implementation – 1995 and 2015 Regulations

For the first 27 years after enactment of the Fair Housing Act, HUD did not meaningfully implement the AFFH provisions of the Fair Housing Act and operationalize its AFFH mandate. It did not issue regulations, or even guidance, to help ensure compliance by the jurisdictions to which it funneled federal housing and community development funds. Nor did it establish any systematic oversight and enforcement regime to assess those jurisdictions’ compliance with their AFFH obligations and intervene where necessary to achieve it. It simply ignored this section of the law, despite having been sued several times itself for failing to implement and enforce the AFFH mandate.³⁵

Finally, in 1995, HUD took a noteworthy step toward fulfilling its statutory AFFH obligation, by adopting the first AFFH regulation. The provisions of the 1995 AFFH regulation were minimal. They required jurisdictions to conduct an analysis of impediments to fair housing (known as an AI), take appropriate steps to overcome those impediments, and maintain records documenting their analyses and the fair housing actions taken. In 1996, HUD published a Fair Housing Planning Guide that offered suggestions about how jurisdictions might go about conducting their AIs and recommending that they be updated every three to five years, a cycle similar to that of the Consolidated Plan (“ConPlan”) that articulated the jurisdiction’s plans for spending Community Development Block Grant (“CDBG”) and other HUD funds over a similar timeframe. However, the 1995 regulation did not provide for routine review of AIs by HUD, and in fact, HUD did not review AIs on any systematic basis. The 1995 regulation did not require the goals laid out in the AI to inform the ConPlan in any way, and typically, there was no connection between these two plans. Nor did the 1995 regulation establish any requirements for engagement with or input from local stakeholders – including members of protected classes, organizations representing them, fair housing organizations or other community-based organizations – on barriers to fair housing, appropriate local fair housing goals, or strategies to achieve those goals. As a result, although they were well-intentioned, AIs ultimately proved unsuccessful as a means to effectuate the AFFH provisions of the Fair Housing Act. During the twenty-year period from 1995 to 2015, HUD’s grantees took few actions to address the fundamental problems of discrimination, segregation and lack of access to opportunity that Congress intended when it adopted this provision of the Fair Housing Act. By 2010, the Government Accountability Office (“GAO”), HUD itself, HUD’s grantees and other stakeholders were all in agreement that the 1995 regulation needed to be further developed to truly fulfill its purpose.

In 2015, HUD adopted a new AFFH regulation. The 2015 rule represented an extremely important and long overdue effort by HUD to take meaningful steps to implement the affirmatively furthering fair housing provisions of the 1968 Fair Housing Act. It was the result of several years of consultation with many different stakeholders, including program participants of various types, sizes and geographic locations, fair housing organizations and others. It went through the required public comment process, during which HUD received over 1,000 comments.³⁶ These included comments from housing providers, trade associations, local jurisdictions and government agencies, and fair housing and civil rights advocates. Through this long and deliberate process, HUD was able to strike a fine balance between the real concerns of government entities that would be subject to the rule and those of their constituents, who are directly impacted by decisions concerning the use of housing and community development dollars in their communities. That rule was extensively vetted internally at HUD, and field tested in 74 jurisdictions through the Sustainable Communities Initiative. It was a careful, inclusive and deliberative rulemaking process that produced a regulation that is flexible enough to accommodate a wide variety of local circumstances, clear and structured enough to provide program participants with the direction and guidance they sought, and rigorous enough to ensure that jurisdictions make meaningful progress in addressing some of the most pressing problems – problems that government had a role in creating and perpetuating – that plague our society.

In January, 2018, HUD effectively suspended the 2015 regulation by delaying for two years the deadline for grantees to submit their required fair housing plans.³⁷ Since most jurisdictions would have been required to submit their plans during that time period, and would not have to update and resubmit their plans until the next Consolidated Planning (“ConPlan”) cycle, this amounted to an effective five-year delay in the implementation of the rule. In May, 2018, HUD withdrew the notice delaying submission of jurisdictions’ fair housing plans, and withdrew the Assessment Tool local jurisdictions needed in order to be able to complete and submit those plans.³⁸ This, too, was an effective suspension of the rule. In both cases, HUD directed its grantees to return to the process required under the 1995 rule, which had been widely deemed ineffective as a means to implement the Fair Housing Act’s AFFH provisions.

On January 14, 2020, HUD proposed a new AFFH rule, which is described in more detail elsewhere in this letter.³⁹ That Proposed Rule utterly fails to fulfill Congress’ intent in enacting the AFFH provision of the Fair Housing Act.

³⁶ See Regulations.gov at <https://www.regulations.gov/document?D=HUD-2013-0066-0001>.

³⁷ FR-5173-N-15 Affirmatively Furthering Fair Housing: Extension of Deadline for Submission of Assessment of Fair Housing for Consolidated Plan Participants, available at <https://www.regulations.gov/document?D=HUD-2018-0001-0001>.

³⁸ FR-5173-N-17 Affirmatively Furthering Fair Housing: Withdrawal of the Assessment Tool for Local Governments, available at <https://www.regulations.gov/document?D=HUD-2018-0039-0001>.

³⁹ FR-6123-P-02 Affirmatively Furthering Fair Housing, available at <https://www.regulations.gov/document?D=HUD-2020-0011-0001>.

The 2015 Rule Fully Aligned with the Fair Housing Act's AFFH Mandate

HUD's 2015 AFFH regulation was the result of extensive consultation and collaboration with a wide range of stakeholders, and public input through the rulemaking and field testing. It responded to the request of HUD's grantees for clearer guidance about steps they should take to fulfill their fair housing obligations and rectified the weaknesses that GAO had identified in the previous regulation released in 1995.

In 2010, the GAO issued a report entitled, "Housing and Community Grants: HUD Needs to Enhance its Requirements and Oversight of Jurisdictions' Fair Housing Plans." (GAO-10-905) The report assessed both the extent to which HUD grantees adhered to HUD's guidance with respect to their required fair housing plans, known as Analyses of Impediments to Fair Housing Choice (AIs), and the adequacy of the AI process as a mechanism for HUD's oversight of its grantees' fair housing obligations.

GAO reviewed 441 AIs as part of its 2010 analysis. It found that 29 percent of those dated from 2004 or earlier, including 11 percent from the 1990s. 25 jurisdictions provided no AI at all, suggesting that they did not have one, and several provided documents that were so brief as to be questionable as AIs. GAO also analyzed 60 AIs that it deemed current (created between 2005 and 2010). It found that the vast majority of these had no timeframes for implementing their recommendations and lacked signatures of top elected officials, which HUD policy encouraged. GAO concluded that these significant weaknesses in the AI process called into question its effectiveness as a system for oversight of grantees' fair housing performance. Its recommendations to HUD focused on the lack of a schedule for completing AIs, the lack of any format for the AIs, the lack of HUD review of the AIs, and the lack of sign-off on the AIs by key elected officials who would be responsible for ensuring their implementation. This last focus was important to ensure that the AIs would inform local decisions about the expenditure of housing and community development funds.

The GAO stated:

"It is unclear whether the AI is an effective tool for grantees that receive federal CDBG and HOME funds to identify and address impediments to fair housing. HUD's limited regulatory requirements and oversight may help explain why many AIs are outdated or have other weaknesses. Specifically, HUD regulations do not establish requirements for updating AIs or their format, and grantees are not required to submit AIs to the department for review. A 2009 HUD internal study on AIs, department officials, and GAO's work at 10 offices identified critical deficiencies in these requirements. For example, HUD officials rarely request grantees' AIs during on-site reviews to assess their compliance with overall CDBG and HOME program requirements, limiting the department's capacity to assess AIs' timeliness and content... In the absence of a department-wide initiative to enhance AI requirements and oversight, many grantees may place a low priority on ensuring that their AIs serve as effective fair

housing planning tools. GAO recommends that, through regulation, HUD require grantees to update their AIs periodically, follow a specific format, and submit them for review.”⁴⁰

The 2015 AFFH rule addressed all of the weaknesses identified in the GAO report, and included a number of other provisions that were critical for ensuring that grantees’ fair housing plans were data-driven, reflected local conditions and priorities, informed decisions about how housing and community development funds would be spent, and held grantees accountable for making progress toward accomplishing the fair housing goals they established.

The 2015 rule included a number of noteworthy provisions that have been stripped out of the proposed 2020 regulation, including the following:

1. A new, clearer definition of affirmatively furthering fair housing. This definition comports with the legislative history and judicial findings that explicate the intent of Congress in enacting Section 3608 of the Fair Housing Act. As detailed in Sec. 5.151 of the 2015 rule:

“Affirmatively furthering fair housing means taking meaningful actions, in addition to combating discrimination, that overcome patterns of segregation and foster inclusive communities free from barriers that restrict access to opportunity based on protected class characteristics. Specifically, affirmatively furthering fair housing means taking meaningful actions that, taken together, address significant disparities in housing needs and in access to opportunity, replacing segregated living patterns with truly integrated and balanced living patterns, transforming racially and ethnically concentrated areas of poverty into areas of opportunity, and fostering and maintaining compliance with civil rights and fair housing laws. The duty to affirmatively further fair housing extends to all of a program participant’s activities and programs relating to housing and urban development.”

The 2020 rule, in contrast, includes a definition of AFFH that fails to align with the Congressional intent and statutory mandate of the Fair Housing Act. The proposed rule makes only passing mention of discrimination, does not mention segregation at all, conflates fair housing and affordable housing, and implies that eliminating local land use, environmental, building, labor and housing regulations will increase the supply of new housing to such an extent that it will eliminate problems related to both lack of affordable units and discrimination against members of protected classes.

2. A robust community engagement requirement. The 2015 rule requires jurisdictions to consult with a range of individuals and organizations, both private and governmental, with relevant knowledge and experience. Among those are “community-based and regionally-based organizations that represent protected class members, and organizations

⁴⁰ U.S. Government Accountability Office, *Housing and Community Grants: HUD Needs to Enhance Its Requirements and Oversight of Jurisdictions’ Fair Housing Plans*, GAO-10-905, (Washington, DC, 2010), p. 2, accessed February 3, 2020 at <https://www.gao.gov/products/GAO-10-905>.

that enforce fair housing laws.⁴¹ Jurisdictions were required to consult with individuals and organizations that have direct experience with the issues and problems under consideration and that would be directly affected by the fair housing actions (or lack thereof) taken by the jurisdiction to address them. The public has access to the same data and information available to the jurisdiction for its fair housing planning purposes, and also has the opportunity to offer additional data and knowledge for consideration. Further, the draft AFH was to be made available for public comment before it was finalized, and the jurisdiction was required to explain why it declined to accept any comments offered, should it do so.

The 2020 proposed regulation eliminates its predecessor's community engagement in a dedicated fair housing planning process. It contains some community engagement provisions that appear to mirror the requirements of the 2015 rule, but incorporates them into the community participation process for the Consolidated Plan. The ConPlan focuses on community development needs and spending, which is an entirely different endeavor – often with entirely different players – than a process that aims to identify barriers to fair housing, determine which are the most pressing, establish priorities among them, and devise strategies to overcome them. For all intents and purposes, folding the fair housing planning process into the ConPlan process, as this proposed rule does, effectively eliminates the fair housing planning process altogether.

3. An analytical framework for jurisdictions to use to conduct their fair housing plans. This analytical framework was known as an Assessment of Fair Housing, or AFH, and provided a format for reporting to HUD. This framework was embodied in an Assessment Tool. It guided jurisdictions through a series of questions about the level of segregation/integration in their communities, the fair housing challenges faced by members of various protected classes, and the identification of the factors and forces driving those challenges. It included a particular focus on areas of hyper-segregation and high levels of poverty, known as Racially or Ethnically Concentrated Areas of Poverty, and it asked jurisdictions to consider the extent to which different communities within the jurisdiction had access to the full range of resources and opportunities available, including, among others, transportation, high performing schools, job access and a healthy environment. The Assessment Tool also walked jurisdictions through the identification of top local fair housing priorities to be addressed over the subsequent three- to five-year period (that is, the time period covered by the jurisdiction's ConPlan), and the establishment of metrics and timelines for assessing progress toward addressing those priorities. HUD completed an Assessment Tool for Local Governments, but was not able to complete the tools for public housing authorities or states before it suspended the AFFH rule. The Assessment Tools were to be reviewed and updated, as necessary, every three years.

The proposed 2020 rule does not require any analysis of any sort, whether that be focused on the extent and nature of segregation in the jurisdiction or the barriers to fair housing faced by members of protected classes under the Fair Housing Act. Even within the framework of housing affordability that the rule adopts, as long as jurisdictions choose

⁴¹ 24 CRF Sec. 91.100(a)(1)

“inherent barriers” from HUD’s pre-approved list of 16, the rule fails to require any analysis to inform the goals jurisdictions must adopt. It does not require any analysis of the housing stock, the impact on housing supply or affordability of the various types of regulations it encourages jurisdictions to eliminate, or what the impact of eliminating any of those regulations might be, on either housing affordability or availability to members of protected classes. By enabling jurisdictions to establish goals without any analytical framework or logical underpinning, the rule opens the door to a situation in which jurisdictions establish goals that are at best uninformed and ill-suited to achieving the mandate of the AFFH provisions of the Fair Housing Act, and at worst, arbitrary and capricious.

4. A data-driven process, facilitated by a HUD’s provision of a relevant, uniform set of data for each jurisdiction. This data set was intended to inform local analysis, and was to be supplemented by local data and knowledge. The data set was extensive, including information about local demographics (both current data and data on trends), housing stock (including details about each type of federally-assisted housing), measures of segregation, and various indicators for access to transportation, education and jobs, as well as measures of environmental hazards and concentrated poverty. The data tool, which was available to the public, included a set of maps enabling users to see how various data and trends played out across neighborhoods, both within the jurisdiction and within the larger region. Because uniform national data are not available for everything a jurisdiction might need to consider – for example, data relevant to the housing needs of people with disabilities – the Assessment Tool provided information about where additional data for that jurisdiction might be found. In addition, the rule provided an opportunity for members of the public to offer both data and other types of information relevant to the fair housing issues under consideration.

The proposed 2020 regulation disregards the need for local data and analysis and does not provide any data, mapping capacity or other analytical tools for jurisdictions to use for purposes of fair housing planning.

5. A regular schedule by which AFHs were to be conducted. This was linked to the Consolidated Planning Cycle, with the AFH conducted first, so its findings could inform the ConPlan. The rule had a similar schedule for PHAs, linked to their five-year planning cycle. Further, the rule stated that AFHs must be updated in the event of major changes in the local housing market, such as those that might be caused by a hurricane or other natural disaster.

The 2020 rule embeds the AFFH process in the ConPlan process. This means that it will occur on the same schedule as the ConPlan, once every three to five years. However, – the fact that the two processes have been combined will also mean that fair housing planning gets short shrift, as jurisdictions will likely prioritize efforts to determine spending priorities. As noted elsewhere, the proposed 2020 rule does not require PHAs to conduct any fair housing planning at all. And the proposed rule is silent on the question of when either AFFH certifications or ConPlans must be updated to reflect the

kind of major changes that occur in the local housing market as the result of a hurricane, pandemic or other disaster.

6. A requirement that the AFH identify and prioritize fair housing goals, with metrics and timelines for assessing progress toward accomplishing those goals. With the public input described above, the Assessment Tool guided jurisdictions to rank their fair housing goals according to their level of priority, and then develop specific metrics and timelines by which their progress toward achieving their highest-ranking goals would be measured. These concrete benchmarks were a critical part of the public accountability built into the 2015 rule.

The proposed 2020 AFFH rule requires each jurisdiction to certify to HUD that it will:

“affirmatively further fair housing by addressing at least three goals towards fair housing choice or obstacles to fair housing choice, identified by the jurisdiction, that the jurisdiction intends to achieve or ameliorate, respectively. The identified goals or obstacles must have concrete and measurable outcomes or changes.”⁴²

While this may appear to provide some structure and accountability, in fact it has little meaning as the goals that HUD deems “inherent barriers” to fair housing choice are, with few exceptions, unrelated to the protected classes under the Fair Housing Act and, in particular, not connected to the intent of the Act’s AFFH provisions. Indeed, some of HUD’s “inherent barriers” may actually undermine the health, safety and welfare of members of protected classes and community residents overall. Further, HUD gives no guidance as to what concrete and measurable outcomes or changes it will consider acceptable or what how it will determine what is an acceptable timeframe for achieving them. The only indication the rule provides of how HUD will approach its evaluation of a jurisdiction’s progress toward achieving its AFFH goals is contained in §91.520 (a)(2) of the proposed rule, which states that HUD will consider the jurisdiction’s performance “satisfactory” if the steps the jurisdiction has taken are “rationally related” to the goals or obstacles it identified in its certification. This is an extremely low bar, suggesting that even steps that have no meaningful impact will be considered acceptable as long as they bear some passing relationship to the identified obstacles. Thus, even within the incorrect framework that HUD has constructed, which is inconsistent with the statutory intent of the Fair Housing Act’s AFFH provisions, the proposed rule is unlikely to spur any meaningful actions, least of all the kinds of affirmative steps that Congress sought.

7. A requirement that the goals from the AFH be incorporated into the ConPlan or PHA plan and annual progress reports. This requirement was one of the most significant elements of the 2015 rule. By creating a direct link between the fair housing plan (the AFH) and the ConPlan (or, for PHAs, the five year PHA plan), the rule created a mechanism by which HUD could effectuate its statutory obligation to affirmatively further fair housing. This provision ensured that fair housing considerations related to ending systemic discrimination, dismantling segregation and creating equitable access to

⁴² See proposed rule, §91.225 (a)(1)

resources and neighborhood amenities for members of protected classes would be incorporated into the jurisdiction's decisions about how to deploy the housing and community development resources it received both from HUD and other sources. It ensured that fair housing planning did not take place in isolation and that it was part of the overall community planning process.

As described above, although the proposed 2020 rule requires jurisdictions to include three or more goals in the certifications they must submit to HUD in conjunction with their ConPlans and report on their progress toward those goals as part of their annual progress reports, the nature of those goals is inconsistent with the intent of the Fair Housing Act and the standard for review is so low as to be nearly meaningless as a mechanism for accountability. Further, the fact that the rule does not require any fair housing planning to be conducted in advance of the ConPlan process all but eliminates any possibility that the ConPlan itself will be informed by, or designed to achieve, fair housing goals.

8. A requirement to submit the AFH to HUD for review and acceptance. Under the provisions of the 2015 rule, jurisdictions were to submit their AFHs to HUD according to an established schedule. HUD had 60 days to review the AFH and determine whether or not it was acceptable. If an AFH was not deemed acceptable, HUD would provide the jurisdiction with specific comments about changes that were needed, and the jurisdictions then had an additional 45 days to make those changes. In this way, the rule anticipated that many jurisdictions might not have the capacity or experience to develop an acceptable AFH, especially the first time they went through this new process. The rule also stated that if HUD did not notify the jurisdiction of any shortcomings in its AFH within that initial 60-day review period, the AFH would be deemed accepted. With these provisions, the rule accounted for the potential need for some back and forth between HUD and the jurisdiction about how best to ensure that the AFH was complete and conformed to the regulatory requirements, while also ensuring the timely flow of CDBG and other HUD dollars. The rule provided that an accepted AFH was a prerequisite for the receipt of CDBG funds, thus underscoring the importance of jurisdictions taking seriously their own obligations to affirmatively further fair housing.

The proposed 2020 AFFH regulation does not require jurisdictions to create fair housing plans, only to certify that they will address three obstacles to fair housing choice. As stated above, HUD's proposed list of such obstacles bears little relationship to fair housing or AFFH as construed under the Fair Housing Act. As long as jurisdictions choose obstacles from HUD's pre-determined list of 16 "inherent" obstacles, HUD will not conduct any review to determine either whether those particular obstacles are relevant and appropriate for the particular jurisdiction or whether the "concrete and measurable outcomes" are meaningful or timely. As a result, this rule falls far short of providing jurisdictions with the kind of guidance and oversight that were called for in GAO's 2010 report on HUD's fair housing oversight.

9. A requirement for PHAs to conduct an Assessment of Fair Housing in conjunction with their five year PHA plans. In some communities, PHAs are the largest landlords, and in

many communities, they have also been a significant player in creating and sustaining discrimination and segregation, and have been the subject of numerous fair housing complaints. Despite this, PHAs had never been required to conduct AIs or been the subject of comprehensive, consistent fair housing oversight and enforcement by HUD. Therefore, this provision of the 2015 rule was a significant step toward ensuring that these agencies, which receive significant funding from HUD and also control critical affordable housing resources, had explicit requirements for fair housing planning, along with clear direction and necessary support. Recognizing that this was unfamiliar territory for many PHAs and that some have limited resources, the 2015 rule encouraged PHAs to collaborate with their local jurisdictions or their states to conduct their Assessments of Fair Housing. This enabled them to share expertise and overhead costs. It also helped to ensure that jurisdictions and PHAs coordinated to maximize their resources and coordinate their approaches to addressing the fair housing problems faced by their common constituents.

Despite the fact that HUD never finalized the PHA templates or datasets, and therefore the obligation for PHAs to comply with the 2015 rule was never triggered, a significant number of PHAs joined forces with their jurisdictions and participated in the AFH process before HUD suspended it in January, 2018. According to information provided by HUD, 25 PHAs participated in the 41 AFHs that HUD accepted prior to January 5, 2018, and in some cases, multiple PHAs collaborated in a particular AFH.⁴³

In contrast, the proposed 2020 rule eliminates any meaningful fair housing planning requirement for PHAs. It maintains the requirement that they participate in the ConPlan process, a requirement that historically has failed to result in any effective fair housing outcomes. It requires PHAs to certify that they have consulted with their local jurisdiction on “how to satisfy their obligations in common to affirmatively further fair housing,”⁴⁴ a phrase that is vague and undefined. Finally, it requires PHAs to certify that they will carry out their plans in accordance with various civil rights laws, which merely restates existing statutory requirements and has little meaning in the absence of clear direction, oversight and enforcement, which this rule fails to provide. In sum, the proposed 2020 rule will allow PHAs to ignore their fair housing obligations with impunity.

Examples of Impact from Assessments of Fair Housing

The Proposed Rule erroneously suggests that the existing 2015 rule is overly prescriptive and that the *Inclusive Communities Project* Supreme Court decision stands for the proposition that the 2015 rule should be revised because of its overly prescriptive nature. This is a deeply misguided assertion; indeed, the existing 2015 rule offers program participants significant flexibility to set their own priorities and policies. The 2015 rule itself gives guidance about the process that program participants must go through in identifying goals, but it does not prescribe in any way what goals jurisdictions must adopt, how many goals jurisdictions must adopt, or

⁴³ “List of AFHs Accepted by HUD Prior to 01/05/2018 FR Notice,” provided to NFHA by HUD on June 7, 2018, on file with NFHA.

⁴⁴ Proposed AFFH rule, §903.7(o)(1).

what associated actions they must take. In fact, the Proposed Rule is more prescriptive than the existing rule in the way that it defines the set of goals and number of goals a jurisdiction must identify.

The existing 2015 rule – even as observed in the mere year and a half during which it was implemented – serves important functions that will be lost if the proposed rule is implemented. The current rule requires program participants to evaluate inequities in neighborhood amenities and associated inequities in the allocation of resource investments and to contextualize trends in local markets. For example, a program participant may create a regional map of where multifamily housing development proposals are granted or denied, detailing how those approvals and denials overlap with racial segregation, where these land use decisions were otherwise made in isolation and without consideration or understanding of the broader programmatic patterns. The current rule also requires program participants to identify local remedies through an assessment process that engages different stakeholders and sectors than just those that receive HUD funds, which allows for a more comprehensive response in identifying persistent barriers to fair housing. Additionally, the current rule allows program participants to coordinate housing and land use resources and decisions for better comprehensive outcomes than they could achieve through just focusing on HUD dollars.

A total of 41 jurisdictions completed the Assessment of Fair Housing process and had their AFHs accepted by HUD before it suspended the AFFH rule in 2018. A review of those AFHs demonstrates the benefits of the 2015 AFFH rule in guiding jurisdictions to examine patterns of discrimination and segregation in their communities, assess the ways in which those patterns result in inequities in access to resources and opportunities, and establish concrete, measurable goals for remediating these problems. The AFHs from Paramount, California, New Orleans, Louisiana, and Seattle, Washington were accepted before HUD suspended the 2015 AFFH rule and illustrate some of the ways jurisdictions planned to address identified barriers to fair housing.

Paramount, California - Located southeast of Los Angeles, Paramount has a population of approximately 54,000. Its AFH states that 78 percent of the population identifies as Hispanic, and 11 percent identify themselves as Black Non-Hispanic. The AFH notes that the city has a significant number of new immigrants, largely from Mexico.⁴⁵ As described by researchers at MIT, "...Paramount, California's AFH seeks "to promote housing accessibility for all protected classes" and sets out new policies to increase accessibility and deadlines to implement those policies, including: "[a]mend the Zoning Ordinance to permit 'second units' by right in all residential zones," and "[a]mend the City's Zoning Ordinance...to include licensed residential care facilities serving six or fewer persons as a permitted use by right in all residential zones"(City of Paramount, 2016, p. 50). The goal goes on to list several additional amendments to the zoning code and other policy changes that can contribute to affordable housing. These zoning or policy changes have explicit deadlines so progress can easily be tracked."⁴⁶ In

⁴⁵ Paramount, CA Assessment of Fair Housing, October, 2016, p. 14-15. Available at <https://furtheringfairhousing.mit.edu/assessment-fair-housing-city>.

⁴⁶ Steil, Justin and Nicholas Kelly, "The Fairest of Them All: Analyzing Affirmatively Furthering Fair Housing Compliance," Working paper for the The Future of Housing Policy in the U.S. Conference,

addition, they include dates by which the proposed actions will be completed, and indicate who has responsibility for achieving them.

New Orleans, Louisiana - New Orleans conducted its AFH in conjunction with the Housing Authority of New Orleans (HANO). In its AFH, New Orleans sets out seven overarching goals it intends to adopt to address local barriers to fair housing. These include, “5. Expand efforts in creating equitable healthy housing that recognizes the direct connections between healthy housing and quality of life and 6. Stabilize neighborhoods vulnerable to gentrification by preserving existing ownership and affordable rental housing and developing affordable homeownership and rental housing.”⁴⁷ To achieve those goals, New Orleans planned to reserve publicly owned land in high opportunity neighborhoods for affordable housing, laying out specific benchmarks for the number and location of units to be developed and the timeframe for doing so, as well as the city agencies responsible for carrying out this strategy. It also committed to prioritize public subsidy for development in high-opportunity neighborhoods by incorporating this priority in the scoring system for developments. Another strategy the City articulated was to promote reforms to current zoning regulations including the development of mandatory inclusionary zoning policies to support the production of affordable housing in high opportunity neighborhoods. Again, the AFH incorporates timelines for accomplishing these measures and identifies the agencies responsible.⁴⁸

Seattle, Washington - Seattle also worked in collaboration with its housing authority. As noted by Steil and Kelly, “Seattle’s AFH identifies three primary fair housing issues: “to create opportunities for housing mobility for those who may wish to leave a R/ECAP [Racially or Ethnically Concentrated Area of Poverty], protect those who wish to stay in Seattle from further risk of displacement, and finally to correct inequities in access to community infrastructure and assets” (City of Seattle and Seattle Housing Authority, 31 2017, p.6). The AFH draws on Seattle’s preexisting Race and Social Justice Initiative and focuses extensively on increasing the affordability of housing and preventing displacement. Some of the goals propose new policies to expand the supply of affordable housing in neighborhoods where residents are at high risk of displacement, such as piloting city bond financing for affordable housing or advocating for a state preservation tax exemption to incentive landlords to preserve affordable housing. Other goals include promoting equitable development by rehabilitating existing public housing and expanding the subsidized housing stock, such as the goal of replacing 561 existing public housing units at the Yesler Terrace development and creating 100 new units serving those with incomes below 30 percent of the Area Median Income (AMI); 290 new homes serving those between 30 and 50 percent of AMI; 850 new homes serving those between 50 and 80 percent of AMI; and 1,200 to 3,200 market rate homes (City of Seattle and Seattle Housing Authority, 2017, p. 376).”⁴⁹ Seattle’s AFH, like those of the other jurisdictions discussed here, identifies the city agencies with responsibility for achieving these goals.

University of Pennsylvania, September 15, 2017, p. 14. Available at <https://furtheringfairhousing.mit.edu/affh-research>.

⁴⁷ City of New Orleans and Housing Authority of New Orleans, Assessment of Fair Housing, p.4. Available at <https://furtheringfairhousing.mit.edu/assessment-fair-housing-city>.

⁴⁸ Ibid, p.126-7.

⁴⁹ Steil and Kelly, op. cit. p. 30-31.

These are just a few of the goals set out in the AFHs of Paramount, New Orleans and Seattle. As these AFHs illustrate, the fair housing plans developed under the 2015 AFFH regulation laid out concrete steps each jurisdiction would take to address the fair housing barriers they identified. These plans are grounded in an analysis of local patterns of discrimination and segregation and public input about which fair housing barriers should be the highest priority to tackle in order to create more equitable access to community resources and overcome each city's legacy of discrimination and segregation. As they move forward with implementation of their plans, these cities will be enhancing their communities' health and vitality and providing the best possible future for their children.

Scholarship by MIT professor Justin Steil reviews the completed Assessments of Fair Housing under the existing rule in an article entitled, "The Fairest of Them All: Analyzing Affirmatively Furthering Fair Housing Compliance."⁵⁰ Professor Steil writes, "Although the rule provides a more rigorous structure for plan compliance than previously, ... it still gives substantial flexibility to localities." This scholarship identifies that participating program participants came up with many different kinds of strategies. The diversity of goals that jurisdictions adopted, in itself, undercuts the spurious assertion that the 2015 rule is overly prescriptive.

Analysis of the Proposed 2020 AFFH Rule

In stark contrast to the 2015 rule, this new proposed rule⁵¹ effectively eliminates the AFFH mandate of the Fair Housing Act and discards the equity and opportunity lenses that were key to the 2015 AFFH rule HUD seeks to replace. The proposed rule is premised on the notion that if jurisdictions remove the "barriers" to affordable housing development and let the market operate without constraints, it will solve their affordable housing problems and that, in turn, will solve our fair housing problems. It does not acknowledge systemic discrimination or segregation in any way and it completely ignores the connection between where one lives and the opportunities they may or may not have as a result. It ignores the multitude of disparities that have been created and fostered by persistent segregation or the role that decisions concerning the placement and design of housing and community development investments have on producing them. It has virtually no reference to protected classes and it does not require jurisdictions to provide meaningful explanations for how their housing and community development decisions will address the issues they choose to prioritize.

The proposed rule completely changes the concept of what it means to affirmatively further fair housing. Under the proposed rule, AFFH is defined as "advancing fair housing choice within the program participant's control or influence." "Fair housing choice" is defined as allowing individuals and families [to] have the opportunity and options to live where they choose, within their means, without unlawful discrimination related to [protected class status]." It consists of 3 components:

1. Protected choice, which means access to housing without discrimination.
2. Actual choice, which means not only that affordable housing options exist, but that information and resources are available to enable informed choice.

⁵⁰ Ibid, abstract.

⁵¹ Affirmatively Furthering Fair Housing, 85 Fed. Reg. 2041 (January 14, 2020).

3. Quality choice, which means access to affordable housing options that are decent, safe and sanitary, and for people with disabilities, access to accessible housing as required under civil rights laws.⁵²

Jurisdictions would meet this threshold by certifying, in conjunction with their ConPlans, that they will affirmatively further fair housing by identifying at least 3 goals to work toward addressing obstacles to fair housing choice “within their control or partial control.” Fair housing obstacles can be chosen from among 16 pre-determined obstacles that HUD considers “inherent” barriers to fair housing choice. These are:

1. Lack of a sufficient supply of decent, safe, and sanitary housing that is affordable.
2. Lack of a sufficient supply of decent, safe, and sanitary housing that is affordable and accessible to people with disabilities.
3. Concentration of substandard housing stock in a particular area.
4. Not in derogation of applicable federal law or regulations, inflexible or unduly rigorous design standards or other similar barriers which unreasonably increase the cost of the construction or rehabilitation of low-to- mid price housing or impede the development or implementation of innovative approaches to housing.
5. Lack of effective, timely, and cost- effective means for clearing title issues, if such are prevalent in the community.
6. Source of income restrictions on rental housing.
7. Administrative procedures which have the effect of restricting or otherwise materially impeding the approval of affordable housing development
8. High rates of housing-related lead poisoning in housing.
9. Artificial economic restrictions on the long-term creation of rental housing, such as certain types of rent control.
10. Unduly prescriptive or burdensome building and rehabilitation codes.
11. Arbitrary or excessive energy and water efficiency mandates.
12. Unduly burdensome wetland or environmental regulations.
13. Unnecessary manufactured- housing regulations and restrictions.
14. Cumbersome or time-consuming construction or rehabilitation permitting and review procedures.
15. Tax policies which discourage investment or reinvestment.
16. Arbitrary or unnecessary labor requirements.⁵³

With one exception, the availability of accessible housing units, which presumably means access to appropriate housing for people with disabilities, none of these goals relates to protected classes under the Fair Housing Act. Most of these goals are deemed “inherent” obstacles to fair housing choice without any explanation or justification. These include such items as design standards and building and rehabilitation codes and review procedures, rent control, “arbitrary or excessive” energy and water efficiency mandates, wetland or environmental regulations, tax policies that “discourage” investment or reinvestment, and arbitrary labor requirements. These terms are subject to widely varying interpretations and, with no requirements for jurisdictions to meaningfully explain why they chose particular goals or how the removal of “obstacles” would increase nondiscriminatory access to housing and neighborhood opportunity, jurisdictions will be

⁵² Ibid, p. 2045.

⁵³ Ibid, p. 2056.

able to spend federal dollars in ways that may further perpetuate segregation or known fair housing issues. Goals chosen from HUD's list need not be based in HUD-prescribed analysis or data. Jurisdictions would not be required to conduct an analysis of any chosen barrier or provide data to justify their decision. In the unlikely event that jurisdictions choose goals not enumerated in the proposed regulation, they would only be required to include a brief narrative of how those goals would affirmatively further fair housing. No fair housing analysis would be required.

After a jurisdiction has identified its goals and described how those will be achieved in its ConPlan, it must report outcomes in its subsequent Consolidated Annual Performance Evaluation Reports ("CAPERs"). HUD will deem the jurisdiction's actions satisfactory if the steps the jurisdiction has taken are "rationally related" to its identified goals.

Under the Proposed Rule, PHAs would no longer be required to conduct a fair housing analysis. Instead, they would have to certify that they have consulted with their local jurisdiction about how to affirmatively further fair housing and that they will carry out their plans in conformity with applicable civil rights laws.

The proposed rule also eliminates a separate fair housing planning process or document, and any separate requirement for a community engagement process designed to elicit fair housing problems. Instead, fair housing considerations, to the extent that they can actually be assessed under the other components of the proposed rule, are obscured and buried among existing community planning requirements.

HUD also plans to conduct what it terms a "jurisdiction risk analysis" (see FR 6123-P-02 Sec. 5.155), under which it would rank jurisdictions each year and sort them into three categories, with those at the top being deemed outstanding and those at the bottom, which would be deemed failing and in need of an enhanced review. Jurisdictions will be ranked against each other in six groups, creating an incentive for arbitrary competition rather than collaboration. These groups include:

- i. Jurisdictions with population growth and tight housing markets.
- ii. Jurisdictions with population growth and loose housing markets.
- iii. Jurisdictions with population decline and tight housing markets.
- iv. Jurisdictions with population decline and loose housing markets.
- v. States with significant population growth.
- vi. States without significant population growth.

Low-ranking jurisdictions may have their certifications questioned, and jurisdictions ranked "outstanding" would receive potential benefits for the next 24 months, including additional points in competitive funding programs, and eligibility for additional funds recaptured or reallocated from various programs. None of the variables that HUD suggests it may use for this analysis relate to actual fair housing barriers and it does not propose to break out the data out by race, ethnicity, or any other protected characteristic.

A jurisdiction's "outstanding" rank could only be challenged if it has been found in violation of civil rights laws, as adjudicated by a court or administrative law judge in a case or complaint brought by HUD or DOJ. No other enforcement action outcomes could be used as justification

for the removal of a jurisdiction's "outstanding" designation. This is especially concerning as the majority of reported fair housing complaints are investigated by private, nonprofit, fair housing organizations tasked with providing fair housing services in local housing markets.⁵⁴ Furthermore, it is highly unlikely that any jurisdiction that does have a civil rights action taken against it by HUD or DOJ could possibly lose its "outstanding" grade. The overwhelming majority of HUD and DOJ enforcement actions result in settlements in which admission of guilt is seldom made and very few, if any, receive a formal adjudicated decision.

This "adjudicated" cases standard is not an appropriate measure to evaluate whether a jurisdiction is free of fair housing barriers. Whether a jurisdiction is "free of adjudicated fair housing claims" is not relevant to a determination of whether a jurisdiction has identified fair housing issues. Public and private fair housing enforcement actions often result in settlements that are entered into before an adverse ruling is entered in a case against a jurisdiction. When the federal government finds as a matter of law that a civil rights violation exists, such as when DOJ files a civil rights lawsuit or when HUD makes a determination of a civil rights violation, by delegation on behalf of the Secretary of HUD, those actions should be a dispositive determination of a failure to AFFH. HUD's proposed "adjudicated" cases standard deviates from the "Resolution of Civil Rights Matters" guidance articulated in the HUD Notice of Funding Availability policy requirements section, which appropriately accounts for a program participant's fair housing liability and has been HUD's practice for many years.⁵⁵

Of additional concern is the likelihood that under the ranking rubric HUD is proposing larger cities will be disproportionately ranked lower than smaller cities that don't face the same types of housing market conditions. This ranking system will not only falsely qualify cities and states according to HUD's flawed rubric, but it will also negatively impact cities with larger populations and with the highest concentrations of people of color and other protected classes.

The Proposed Rule is not a fair housing rule. Instead, it is an effort to promote deregulation based on the unfounded notion that an unfettered market will serve the needs of all people fairly and efficiently. The experience of the foreclosure crisis taught us that when left to its own devices, the private market will not serve communities of color and other marginalized communities. In the run-up to the foreclosure crisis, previously disinvested communities of color were targeted for predatory, unsustainable loans with toxic terms and feature. And in the absence of federal affordable housing programs, the private market has not closed the gap between the supply of and demand for affordable housing. The Proposed Rule's approach fails to recognize these experiences.

⁵⁴ See National Fair Housing Alliance, "2019 Fair Housing Trends Report: Defending Against Unprecedented Attacks on Fair Housing." Available at <https://nationalfairhousing.org/2019-fair-housing-trends-report/>.

⁵⁵ See U.S. Department of Housing and Urban Development, General Section to HUD's Fiscal Year 2017 Notice[s] of Funding Availability for Discretionary Programs (General Section) FR-6100-N-01. "Resolution of Civil Rights Matters," <https://hudexchange.info/resources/documents/FY-2017-NOFA-Policy-Requirements-and-General-Section.pdf>, p. 5 of 21.

The Proposed Rule – in both its definition of affirmatively furthering fair housing and in the specific procedures it outlines – appears to suggest that program participants will not be required to assess how public and private barriers to housing choice impact segregation and discrimination. The reference to a program participant acting “within the program participant’s control or influence” is undefined in the Proposed Rule, but it suggests that jurisdictions are limited in their powers to address persistent issues of segregation and discrimination. However, local and state jurisdictions and public housing authorities have broad powers that can be used and the statutory authority to do so under the Fair Housing Act.

Program participants have broad influence and numerous public policy tools available to exert influence on housing and urban development-related decisions; these include zoning, public policy initiatives, and funding programs of various sorts. Historically, as described in detail above, these broad public policy tools have been explicitly implemented to establish racial and other forms of segregation. Relatedly, the federal government played a central role in creating and maintaining segregation and it was Congress’ intent that HUD funds, among other federal funds, should be used to dismantle segregation and remediate its effects. It is imperative that jurisdictions use all their capabilities to address the segregation that they helped form, or that remains as vestiges from their own policies.

The Proposed Rule appears to remove the obligation of program participants to engage the community to assess its own barriers to housing choice, to gather data and assess trends, and to consider how HUD and other funds and resources are used in ways that influence these patterns. Additionally, the Proposed Rule appears to suggest that program participants will not be required to account for the housing market practices of private parties within their jurisdictions, which would fundamentally limit the extent to which any program participant is accounting for the breadth of discriminatory practices that may impact local segregation. Instituting a process that allows program participants to refrain from considering public and private barriers to housing choice does not satisfy the AFFH statutory mandate.

The suggestion that race-conscious considerations may violate constitutional dictates cannot apply to information gathering exercises and so are not relevant regarding any assertion that a program participant should not consider race in analyzing local barriers to housing choice. The Fair Housing Act was passed to address the vestiges of expressly discriminatory housing policy in public housing and private markets. Any suggestion that efforts to address segregation along racial lines or regarding other protected classes should be limited to de facto practices is unsupported in the law.

The Proposed Rule Adopts Standards That are Ambiguous, Misguided and Unworkable

Although the Proposed Rule contains a number of technical terms and requires subjective decisions about the impact of various housing and land use policies and practices, it fails to provide grantees or the public with definitions or standards to use in interpreting its provisions. This ambiguity is likely to cause confusion among grantees and inconsistent interpretations and applications of the rule across jurisdictions.

For example, the rule's list of "inherent barriers to fair housing choice" includes, among others, such items as:

- Lack of a **sufficient supply** of decent, safe, and sanitary housing that is affordable;
- **Concentration** of substandard housing stock in a particular area;
- **Artificial economic restrictions** on the long-term creation of rental housing;
- **Unduly prescriptive or burdensome** building and rehabilitation codes;
- **Cumbersome or time-consuming** construction of rehabilitation permitting and review procedures. (emphasis added)

Yet nowhere does the rule define what is meant by "sufficient supply," "concentration," "artificial," "unduly prescriptive," "burdensome," "cumbersome," "time-consuming," or a host of other terms that are included on that list. The lack of clarity and precision in these terms makes the rule unworkable.

The rule focuses on removing regulations as a means to increase housing production. It is questionable whether this would be the result, but even if it were, this approach is misguided both as a strategy for increasing the supply of affordable housing and as a strategy for addressing barriers to fair housing, as that is contemplated in the Fair Housing Act. The rule provides no analysis to support the notion that removing whichever alleged barriers a jurisdiction may choose will lead to the construction of any meaningful amount of new housing. To the extent that it may do so, in most jurisdictions it is unlikely that such housing will be affordable to low- and moderate-income people, especially in the absence of new subsidy funds. Subsidies are the critical link for making housing affordable to this group, and especially to very low- and extremely-low income people. This rule will not provide any additional subsidies. Further, one of the central goals of the AFFH provisions of the Fair Housing Act was to expand access to the crucial opportunities that are inextricably tied to the location in which one lives: education, jobs, transportation, healthy environment, healthy food and the like. Accomplishing that goal requires a strategic approach that will ensure that affordable housing is built in locations where it is currently lacking and also that needed investments are made in neighborhoods that have a supply of affordable housing but lack other amenities and resources. A strategy that relies entirely on the free market, as this Proposed Rule does, simply cannot result in the kind of targeted outcomes that are necessary to fulfill the AFFH mandate. Nor can this approach knock down the barriers created by discriminatory policies and practices that prevent members of protected classes, regardless of income, from gaining access to the housing they need in the neighborhood of their choice. And in many communities, including those experiencing upward pressure on housing prices and high rates of gentrification, the proposed rule's approach of removing housing, labor, environmental and other regulations and oversight may serve to fuel displacement and compound problems related to segregation and access to high quality housing. Overall, the rule is deeply misguided.

The Proposed Rule also sets out a process by which HUD will conduct what it calls a "jurisdictional risk analysis" that it will use to determine which jurisdictions are successfully performing their AFFH obligations and which are not. The rule proposes to eliminate jurisdictions that are otherwise ranked "outstanding AFFH performers" from that category, namely, the fact that they have received an adverse adjudicated finding from a court of

administrative law judge in a civil rights case brought by either HUD or DOJ, but not any other party. As noted above, this is a misguided and inaccurate basis for making such a determination.

However, even more troubling is the proposed jurisdictional risk analysis itself. In §5.155(c)(1), the Proposed Rule lists the factors that may be considered in this analysis, including median home value and contract rent, household cost burden, percentage of dwellings lacking complete plumbing or kitchen facilities, vacancy rates, rates of lead-based paint poisoning, rates of subpar public housing conditions, availability of housing accepting Housing Choice Vouchers throughout the jurisdiction, the existence of excess Housing Choice Voucher reserves, and availability of housing accessible to people with disabilities.

The Proposed Rule does not describe the methodology that will be used to conduct this assessment. Nor does it describe the standards HUD will use to determine which jurisdictions are successful and which are not. Critically, these data points have little bearing on discrimination or segregation and are not disaggregated by or otherwise correlated to their application to members of particular protected classes under the Fair Housing Act.

The Urban Institute has analyzed the impact of removing consideration of race from the assessment of jurisdictions' AFFH performance and replacing it with race-neutral, jurisdiction-wide indicators.⁵⁶ It conducted this analysis for the 100 largest CDBG entitlement jurisdictions, comparing their rankings based on the overall number of residents in the jurisdiction experiencing severe housing cost burden, a measure of housing affordability identified by HUD in the proposed regulation, with their rankings based on a series of metrics, including severe housing cost burden and others, for Black and Latino residents of those jurisdictions. The Urban Institute researchers found that in 90 of these 100 jurisdictions, their ranking according to one or more of the metrics that factored in race or national origin differed by 25 or more positions than their ranking based on the HUD-proposed, aggregate metric. Seven jurisdictions ranked higher on the race-neutral metric than they would have using any of the race-based metrics. Thirteen jurisdictions ranked lower on the race-neutral metric than the race-based ones. The researchers' conclusion was, "these results suggest that the relationships among metrics of affordable housing access are complex, and aggregate metrics – or a uniform ranking system – cannot accurately reflect that complexity."⁵⁷

The only conclusion that can be drawn from all of these flaws is that this is a rule that is so egregiously ambiguous, poorly designed and misguided as to be arbitrary, capricious and unworkable. The level of ambiguity alone would undoubtedly lead to inconsistent implementation by jurisdictions and inconsistent enforcement by HUD itself.

⁵⁶ See <https://www.urban.org/research/publication/hud-omits-race-fair-housing-proposal>.

⁵⁷ Urban Institute comments to HUD on 2020 Proposed Affirmatively Furthering Fair Housing Regulation, Docket No. FR 6123-P-02, RIN 2577-AA97, available online at <https://www.urban.org/research/publication/hud-omits-race-fair-housing-proposal>.

HUD’s Justifications for Adopting a New Rule are Not Accurate and are Otherwise Lacking

HUD offers several justifications for repealing the 2015 AFFH regulation and replacing it with this proposed rule. It asserts that the 2015 rule was too prescriptive in outcomes for jurisdictions, that the rule had an unacceptably high failure rate, that it was insufficiently flexible to account for differences among jurisdictions, that it lacked sufficient focus on outcomes, and that HUD lacked the capacity to provide the tools needed by jurisdictions to complete their Assessments of Fair Housing.

These justifications do not stand up to scrutiny. The rule provided tremendous flexibility to local jurisdictions, allowing them – based on their analysis of relevant data and input from local stakeholders – to establish their own priorities, goals, metrics and timelines, and strategies. Unlike the proposed rule, it did prescribe a limited set of strategies that were pre-determined by HUD and disconnected from any understanding or analysis of the local context.

HUD mischaracterizes the “failure rate” of the 2015 rule, which anticipated that for jurisdictions going through a brand-new process for the first time, there might be a need for consultation with HUD and revisions to an initial proposed plan in order to create a plan that met threshold program requirements. That back and forth was built into the regulation itself, and the fact that some jurisdictions availed themselves of the process is indicative neither of a failure rate nor an unduly complex process.

The early results under the 2015 rule were extremely promising, contrary to HUD’s erroneous and unfounded characterization of them as highly prescriptive regulations. For example, they undertook more robust community engagement efforts, offering more opportunities for public input and involving a larger number and wider range of stakeholders than was typical under the AI process.⁵⁸ Jurisdictions analyzed residential patterns and trends through a focused, fair housing lens, assessing the extent to which members of protected classes have equitable access to important community assets, resources and opportunities. They set priorities for addressing their particular local (and in some cases, regional) fair housing problems, and adopted concrete goals, with metrics and milestones to measure their progress toward achieving those goals.⁵⁹

The 2015 rule tied the timeline for performance evaluation to the timeline for the Consolidated Plan, with annual updates provided through the performance reports and any needed adjustments incorporated into the annual action plan. At the end of the ConPlan cycle, HUD would review the jurisdiction’s progress toward achieving its goals and intervene as necessary to ensure compliance. The proposed new rule takes the exact same approach to evaluating compliance, although it sets an extremely low bar that is unrelated to fair housing for assessing grantee performance.

⁵⁸ See Been, Vicki and Katherine O’Regan, “The Potential Costs to Public Engagement of HUD’s Assessment of Fair Housing Delay,” NYU Furman Center, March 9, 2018.

⁵⁹ See, for example, the research of Justin Steil and Nicholas Kelly, “The Fairest of Them All: Analyzing Affirmatively Furthering Fair Housing Compliance,” Working Paper for the Future of Housing Policy in the U.S. Conference, University of Pennsylvania, September 15, 2017.

Further, HUD mischaracterizes its own resources and capacity to carry out its technical assistance oversight responsibilities under the 2015 rule. A significant portion of the resources expended in getting the new process up and running could be characterized as start-up costs. These included developing the data and mapping tool, devising a training curriculum and explanatory materials, and the like. The on-going cost of maintaining these resources would be much lower and would likely have diminished over time as jurisdictions gained experience with the process under the rule and learned from their peers who went through the process before them.

Having gone so long without devoting serious effort to enforcing this provision of the Fair Housing Act, it may not be surprising that HUD now views any expenditure of resources in this area as overly burdensome. But the truth is that failure to address the on-going problems of discrimination and segregation in this country carries significant costs, both financial and otherwise. If HUD lacks the resources it believes it needs to carry out its fair housing obligations effectively, it should seek additional resources from Congress to do so, not replace effective regulations with alternatives that are inadequate to the task.

The Proposed Rule does not account for the fact that HUD is proposing to roll back AFFH requirements that were based on decades of practice that predate the current rule, administered under the 1995 regulations and HUD's fair housing planning guide. HUD's proffered, yet erroneous, justification for these Proposed Rule changes does not in any way support the complete abandonment of a community engagement process to consider locally identified barriers to fair housing choice.

Impact of the Rescission of the 2015 AFFH Rule

If HUD rescinds the 2015 AFFH rule and adopts its proposed 2020 AFFH rule, it would be a major setback for fair housing generally, as well as for HUD's implementation of its own statutory AFFH obligations. The result would be the loss of a number of key elements of the 2015 rule that were critical for its effectiveness in fulfilling that statutory mandate. Among those would be the following:

1. Loss of a definition of AFFH and a process for implementing it that is consistent with Congressional intent. As described above, the legislative history and nearly 50 years' worth of judicial interpretations of the AFFH provision of the Fair Housing Act make it clear that Congress intended HUD to take active steps to use its programs both to end discrimination and to overcome segregation and remedy the harms it caused. The 2015 rule embodies this mandate and establishes an implementation process that is shaped by these considerations, requires HUD's grantees to take active steps to address them, and involves on-going oversight by HUD. After 27 years during which HUD took no actions at all to implement this provision of the Fair Housing Act, followed by 20 years during which it relied on a regulatory process that was ultimately unsuccessful, HUD's adoption now of a regulation that addresses neither discrimination nor segregation, and does not require its program funds to be used to eliminate either, can only be viewed as a major step backwards in its fulfillment of Congress' intent with the AFFH provision of the Fair Housing Act.

2. Elimination of any requirement for jurisdictions to undertake an assessment of local residential patterns of discrimination and segregation. Not only does the proposed 2020 AFFH regulation lack a definition of AFFH that reflects Congress' desire for HUD to use its programs to eliminate discrimination and dismantle segregation and redress its harms, the Proposed Rule does not require HUD's grantees to do any analysis to identify these patterns and practices within their jurisdictions. Many grantees that undertook AFHs under the 2015 rule uncovered residential patterns of segregation and discriminatory practices of which they were previously unaware or had overlooked. The value of the kind of analysis required under the 2015 rule is that it places those discriminatory patterns and practices front and center in a jurisdiction's decision-making process and forces jurisdictions to consider how to address them. This is completely lacking in the 2020 rule.
3. Loss of a data-driven process and elimination of fair housing planning tools that were extremely valuable to HUD's grantees. Decisions about how to spend housing and community development dollars, and how to use the other resources and authorities a jurisdiction has to influence local development patterns, are most effective when they are based on careful review and analysis of relevant data. The 2015 rule incorporated a robust analytical process that was shaped by the critical fair housing questions to be addressed, and incorporated not only quantitative data from HUD and other sources but also other information available to jurisdictions or provided by local stakeholders. The proposed 2020 rule requires no data – from any source – and no analysis.
4. Abandonment of an approach that focuses on the intersection between housing and other key indicators of opportunity and the strategic decision-making that an intersectional analysis can foster. HUD's 2015 AFFH rule was based in part on recognition that the neighborhood in which a person lives has an enormous impact on that person's life: educational and employment opportunities, access to healthy food and safe, reliable transportation, the air and water quality to which they are exposed, their opportunities to build wealth and many others. Over many decades, access to these and other resources and opportunities have been withheld from people and neighborhoods of color through the discriminatory policies and practices of government and the private sector, resulting in tremendous racial and ethnic disparities that harm our nation's cohesion and prosperity. The many strands of work involved in these different fields – housing, community and economic development, education, employment, environment, public health, and the like – often operate in silos and without knowledge of what those in other silos may be planning, despite the fact that all may be targeting many of the same communities. Recognizing these intersections and considering both how to coordinate different planning processes and leverage multiple funding streams leads to the most efficient use of limited resources and creates the most positive impacts. That is what the 2015 rule encouraged. The proposed 2020 rule does not even acknowledge the role of community development efforts in addressing discrimination, segregation and concentrated poverty, despite HUD's role in funding those efforts, let alone the intersection between housing and community development and other fields. The narrow perspective embodied in the proposed 2020 rule will minimize the impact of any efforts it

may spur and delay accomplishment of the goals Congress articulated in the Fair Housing Act.

5. Elimination of meaningful community engagement in identifying and setting priorities among key fair housing goals. The 2015 AFFH rule had a broad set of provisions designed to ensure that the people most affected by the fair housing challenges and barriers in the community had a seat at the table when those issues were discussed and priorities for addressing them were decided. The stakeholders involved included members of protected classes and organizations representing them, agencies that provide a wide range of services (housing, health, social services and others) to those people, and groups involved in fair housing enforcement. In addition, the regulation recommended that jurisdictions consult with a variety of other players, such as other local and regional government agencies, including those involved in transportation and other forms of regional planning. Further, the regulation set out requirements designed to ensure that community members with disabilities and those with limited English proficiency were aware of and could participate in the deliberations. It required a public hearing and other opportunities for comment on a draft AFH. Taken together, these requirements provided for an unprecedented level of access and participation by a wide range of community stakeholders. As a result, the AFH was predicated on a sharper and deeper understanding of the issues community residents identified as being most pressing. In turn, this meant that stakeholders were more invested than ever before in the goals articulated and the strategies developed to achieve them. The AFH process facilitated planning that truly reflected the local community and took account of its challenges and strengths. The proposed 2020 rule eliminates any fair housing planning separate from the ConPlan process, which is aimed at a very different result, namely determining how funds should be spent, and its adoption would eliminate an important component of the 2015 rule that created a shared understanding of the community's past and a shared vision for its future.

The Proposed 2020 AFFH Rule Does Not Satisfy the Fair Housing Act's Statutory Mandate

Ultimately, HUD's proposed AFFH rule does not satisfy the "affirmatively further" mandate Congress issued in the Fair Housing Act. The federal Fair Housing Act directs HUD to administer its "programs and activities relating to housing and urban development in a manner affirmatively to further the [FHA's] policies." 42 U.S.C. § 3608(e)(5). Long-established legal standards, articulated in the caselaw, define this statutory mandate to require efforts that dismantle racial segregation in housing, which this Proposed Rule fails to do.

The Proposed Rule outlines a process whereby a local jurisdiction may certify compliance without addressing problems of discrimination. By instituting a process that does not address discrimination – including based on race, national origin, or other protected classes – the Proposed Rule is inconsistent with the law. In a watershed decision that alerted jurisdictions across the country to their liability for a failure to properly satisfy HUD's statutory mandate, prompting calls for HUD to institute clearer guidance for jurisdictions in advance of the current 2015 rule, the court in the *Westchester County* litigation stated that "an interpretation of 'affirmatively further fair housing' that excludes consideration of race would be an absurd result." *United States ex rel. Anti-Discrimination Ctr. v. Westchester Cnty.*, 495 F. Supp. 2d

375, 384–89 (S.D.N.Y. 2007). The Proposed Rule is structured in a manner that fails to provide program participants with the guidance to produce meaningful results in compliance with this statutory mandate.

The Proposed Rule also fails to achieve the statutory mandate when it abandons consideration of issues of neighborhood segregation and racial concentrations of poverty. This shift in approach is clearly exhibited in how the Proposed Rule defines what it means to affirmatively further fair housing. Rather than require that jurisdictions take meaningful action to end “segregated living patterns” and eliminate “racially and ethnically concentrated areas of poverty,” the Proposed Rule limits what may be required of jurisdictions to address individuals’ and families’ housing choice within their means, absent assessment of the broad, neighborhood segregation that impacts this choice. The Third Circuit has held that the “affirmatively further” statutory mandate is intended to promote not just nondiscrimination against individuals, but racial integration for the benefit of entire communities. *Shannon v. U.S. Dep’t of Hous. & Urban Dev.*, 436 F.2d 809 (3d Cir. 1970). The First Circuit noted that §3608 requires HUD to “consider [the] effect [of a HUD grant] on the racial and socio-economic composition of the surrounding area.” *NAACP, Bos. Chapter v. U.S. Dep’t of Hous. & Urban Dev.*, 817 F.2d 149 (1st Cir. 1987). It is simply not possible to meaningfully consider a family’s housing choice without accounting for the segregation and concentrated poverty that characterize our nation’s neighborhoods and proposing otherwise fails to achieve this mandate.

The Proposed Rule does not require program participants to “consider” local barriers to fair housing choice, or that local jurisdictions and public housing authorities engage in some process of informing themselves about fair housing issues. It has long been held integral to the statutory requirement that program participants engage in some form of this “consideration” process that was built into the AI model and augmented by the 2015 AFFH Rule. The Second Circuit held in *Otero v. New York City Housing Authority* that “action must be taken to fulfill, as much as possible, the goal of open, integrated residential housing patterns and to prevent the increase of segregation, in ghettos, of racial groups whose lack of opportunities the Fair Housing Act was designed to combat.” 484 F.2d 1122, 1124 (2d Cir. 1973). Abandoning the central premise under the mandate that local leaders engage community member in considering barriers to fair housing, the Proposed Rule fails to ensure meaningful action will be taken to promote fair housing choice.

Additionally, the statutory mandate expressly applies to “housing and urban development,” yet the Proposed Rule is limited to housing, with a narrow focus on regulations impacting housing development, neglecting the broader scope of urban development that is necessary to account for the neighborhood context in which development may occur or the opportunity it may provide and to whom.

The process detailed in the Proposed Rule – which does not account for racial discrimination, segregated neighborhoods, and a community’s responsibility to assess these issues – does not satisfy the statutory mandate that Congress intended when it passed and ratified the Fair Housing Act.

The Proposed 2020 AFFH Rule Will Continue the Harms of Segregation

The 2015 rule required all levels of government to fully consider the barriers to neighborhood opportunity that their housing and community development decisions affected. Under the 2015 rule, members of a community could raise longstanding disparities affected by the housing and community development decisions their local and state governments or PHAs made. Today, the majority of children in the nation are children of color. Given the known disparities and opportunity gaps that residential segregation and racially concentrated poverty promote, the majority of America's children will experience the same or heightened levels of negative life outcomes if forced to live under the Proposed Rule.

The list of conditions HUD defines as “inherent” barriers is cause for serious concern. By considering building and rehabilitation standards, water and energy efficiency standards, wetland and environmental regulations, and manufactured housing standards or restrictions, HUD appears to be opening the door for jurisdictions to reject important, evidence-based considerations created for the public good. Building requirements that are intended to ensure residents live in safe and decent housing and promote the elimination of substandard housing may be considered an obstacle to fair housing. The elimination of water and environmental regulations intended to reduce exposure of residents to harmful chemical agents, provide safe septic systems, or ensure housing units can safely weather environmental conditions may be considered successful AFFH implementation under the proposed rule. Various forms of rent control that provide affordability and protect against displacement for families with children could be deemed obstacles and removed. Labor requirements intended to ensure worker safety in the construction of units could be removed. Tax policies associated with the construction or operation of housing and which enable local governments to provide important services and community assets for their residents could be considered a fair housing obstacle. And under none of these hypothetical scenarios will HUD conduct a rigorous assessment of the justifications or evidence behind any of the goals of its grantees.

Recommendations

HUD must withdraw the Proposed Rule and immediately reinstate the 2015 rule. The 2015 AFFH rule responded directly to the problems with previous AFFH compliance systems by creating accountability for the decisions that jurisdictions make in the use of their federal dollars. It provided helpful analytical tools to assist jurisdictions in their assessments of the local fair housing barriers they could address. The accompanying data and a mapping tool helped governments understand how their existing housing market did or did not connect their residents to housing, health, transportation, educational, and economic opportunity. The 2015 rule required that governments conduct a robust community engagement process to field concerns from residents, advocates, housing industry professionals, and other government sectors impacted by housing and community development decisions. In sum, it truly connected fair housing planning to the way that community development and housing dollars would be invested in local communities.

It is clear that the Proposed Rule le does nothing to advance housing and neighborhood opportunity and actually conflicts with the intent and purpose of the Fair Housing Act.

Furthermore, the motives behind the disproportionate impact that HUD's proposed ranking system will have on the largest cities in the nation where the majority of the nation's population of color is concentrated requires serious scrutiny. It is unfathomable how HUD plans to actually assess jurisdictions' fair housing compliance if they are not required to consider, even at the most basic level, how their housing and community development investments will affect fair and equitable access for people of color, families with children, people with disabilities, and other communities protected by the Fair Housing Act.

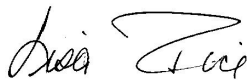
Conclusion

Despite the clear evidence that residential segregation and racially concentrated poverty harms communities and children, the Proposed Rule brazenly abandons the goals of the Fair Housing Act. Simply put, the Proposed Rule is not a fair housing rule. Instead, the proposal reflects an endorsement of the residential segregation that has plagued the nation since its inception and an abdication of HUD's own responsibility to ensure that its own programs comply with the Fair Housing Act. At its core, the Proposed Rule is a poorly disguised deregulatory agenda that incorrectly asserts that with the creation of affordable housing discrimination will simply disappear. To be clear, the presence of affordable housing does not mean that it is free from discrimination but the Proposed Rule falsely equates the two. By abandoning the requirement to conduct any analysis of the barriers to housing and neighborhood opportunity for protected classes, and by making no requirement to assess the level of residential segregation or racially concentrated poverty in any given geography, HUD will effectively greenlight discrimination and allow the perpetuation of segregation and its resultant harms indefinitely.

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Thank you for the opportunity to submit these comments. If you have questions or need further information about them, please contact Debby Goldberg (dgoldberg@nationalfairhousing.org) or Morgan Williams (mwilliams@nationalfairhousing.org) on my staff.

Sincerely,



Lisa Rice
President & CEO
National Fair Housing Alliance